No. 88-281

In The

Supreme Court of the United States

October Term, 1988

PATRICIA SHEEHAN, ELIZABETH HENOCH, and KAYHAN HELLRIEGEL, on behalf of themselves and all others similarly situated,

Petitioners,

- against -

PUROLATOR, INC. and PUROLATOR COURIER CORP.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JUDITH P. VLADECK
1501 Broadway, Suite 800
New York, New York 10036
(212) 354-8330

Attorney for Petitioners

Of Counsel:
VLADECK, WALDMAN, ELIAS
& ENGELHARD, P.C.
Attorneys for Petitioners

JOSEPH J. GARCIA
On the Petition

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 88-281

In The

Supreme Court of the United States

October Term, 1988

PATRICIA SHEEHAN, ELIZABETH HENOCH, and KAYHAN HELLRIEGEL, on behalf of themselves and all others similarly situated,

Petitioners,

- against -

PUROLATOR, INC. and PUROLATOR COURIER CORP.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents urge this Court to deny *certiorari* because petitioners do not present "questions of general importance warranting review," and because *Watson v. Fort Worth Bank & Trust Co.*, — U.S. —, 118 S.Ct. 2777 (1988) allegedly does not apply to this case. Respondents also claim that petitioners waived any consideration of the *Watson* issue because they did not "preserve" it by specifically raising the question to the Court of Appeals. This latter argument is made despite the fact that the

District Court ruled on the subjective practices issue and, at the time of appeal, controlling Second Circuit law was in accord with the District Court's decision.

I.

THE DECISIONS BELOW CONTRAVENE EISEN v. CARLISLE & JACQUELIN, 417 U.S. 156 (1974).

Respondents attempt to divert attention from the real issue, that the decisions run afoul of this Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) with the simplistic statement that " '[t]he class determination generally involves considerations that are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." ' " (Brief in Opp. 9) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)). In this case, however, the Court of Appeals declined to discuss the Rule 23 requirements of numerosity, commonality, typicality, or adequacy of representation because it found that plaintiffs did not establish "class-wide proof of an aggrieved class." (App. 7). In support of its decision on the Rule 23 motion, the Court of Appeals, ignoring the "considerable amount" of class-wide evidence of discrimination found to exist by Judge Kearse, only determined that the rulings on the merits by the District Court were not clearly erroneous, or were "plausible in light of the record." (App. 11). These rulings demonstrate that the Courts of Appeals' Rule 23 decision was totally dependent on its decision on the merits. Although some analysis of the merits may be allowable under *Eisen*, both the District Court and the Court of Appeals went beyond mere probing; they required plaintiffs to prove their claims in order to obtain class certification.

This Court has recognized the significance of class actions to American jurisprudence and has set the rules by which lower courts are to grant or deny class certification. The decisions by the courts below are in direct conflict with *Eisen* and signal new requirements that already have been rejected by this Court. Given these circumstances, the issues presented are of general importance.

II.

WATSON APPLIES; PETITIONERS DID NOT WAIVE THE WATSON ISSUE.

In claiming that this Court's recent decision in *Watson* does not govern the class certification issue, respondents bypass the District Court's conclusion that it was "crucial" to determine whether plaintiffs' salary claims could be analyzed under the disparate impact model before a decision on the Rule 23 motion could be rendered. (App. 42). Finding that they could not, the District Court then proceeded to search for other class members, through affidavits, who "felt aggrieved"—a requirement the District Court believed to have been imposed by *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982) in disparate treatment cases. (App. 47-50). Because of this initial erroneous ruling on the subjective practices issue, which is directly contrary to *Watson*, the District Court ignored the "considerable" class-wide evidence of dis-

crimination found by Judge Kearse.[1] *Watson* is thus directly implicated by the decisions below.

Respondents also urge that petitioners waived any *Watson* argument because they did not ask the Court of Appeals to reconsider Second Circuit law established previously in *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590 (1986). In *Rossini*, the Court of Appeals ruled that subjective practices could not be analyzed under the disparate impact model. *Id.* at 605. The *Watson* argument was not waived, however, because petitioners argued on appeal that, in light of class-wide proof of discrimination in the record, it was error for the District Court to have required affidavits from individual class members. The only reason the District Court imported the requirement that affidavits be supplied was its earlier erroneous ruling that this case could not be analyzed under the disparate impact model. (*See* App. 49-50). As the erroneous ruling regarding affidavits was challenged by petitioners in the Court of Appeals, the *Watson* issue was not waived.

In any event, the rule regarding waiver is not as inflexible as respondents suggest. As this Court explained in *Hormel v. Helvering:*

---

1. Judge Kearse did not specifically concur in the majority's decision on the Rule 23 motion. Such non-concurrence is not surprising given that the evidence Judge Kearse would have relied upon for reversal involved class-wide discriminatory policies and practices. That "considerable" amount of evidence should have formed the basis of the Rule 23 inquiry, not the affidavits required by both the Court of Appeals and the District Court.

> Rules of practice and procedures are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice, under which the courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

312 U.S. 552, 557 (1941). *See also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984) ("Although we do not ordinarily consider questions not specifically passed upon by the lower court, this rule is not inflexible, particularly in cases coming, as this one does, from the federal courts.") (Citations omitted). Here, although petitioners did not ask the Second Circuit to reconsider its prior ruling in *Rossini*, the issue was fully briefed and considered by the District Court, and the issues raised on appeal arose from the District Court's erroneous decision.

Finally, respondents misstate the development of the law in suggesting that the *Watson* issue should have been "preserved" because there was a conflict in the circuits. At the time *Rossini* was decided, there already had existed a conflict in the circuits and that conflict was acknowledged by the Second Circuit. In *Rossini*, 798 F.2d at 605. The District Court itself also noted a conflict in the circuits. (App. 45.) In this light, justice should not require that petitioners have asked the Second Circuit to reexamine *Rossini* for the mere sake of "preserving" the legal theory. No party should have to "preserve" an issue that has already been fully considered in controlling circuit precedent.

CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be granted.

Dated: New York, New York
September 24, 1988

Respectfully submitted,

JUDITH P. VLADECK
Attorney for Petitioners
1501 Broadway, Suite 800
New York, New York 10036
(212) 354-8330

VLADECK, WALDMAN, ELIAS
& ENGELHARD, P.C.
Attorneys for Petitioners

JOSEPH J. GARCIA
On the Petition